



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-95-5/18-T

Date: 16 February 2011

Original: English

IN THE TRIAL CHAMBER

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 16 February 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON ACCUSED'S MOTION FOR FOURTH SUSPENSION OF PROCEEDINGS

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) hereby provides its reasons for its oral decision of 10 February 2011 on the “Motion for Fourth Suspension of Proceedings”, filed by the Accused on 2 February 2011 (“Motion”).

1. According to the Motion, on 31 January 2011, the Office of the Prosecutor (“Prosecution”) disclosed to the Accused “1725 items totalling an estimated 32,000 pages and 142 videos containing an estimated 200 hours of material” (“Disclosed Material”).¹ The Accused submitted that more than 90 per cent of this material is in BCS and relates to the Prosecution’s case dealing with the alleged takeover of municipalities in Bosnia and Herzegovina.²

2. Given the volume of the Disclosed Material, the Accused requested that the trial proceedings be suspended for a period of three months after the testimony of Sarajevo witness Sanija Dževlan (KDZ342) on 15 February 2011, until 15 May 2011, with the exception of four Sarajevo witnesses who are scheduled to testify on fixed days in March 2011.³ He referred to the three other occasions when the Chamber ordered a suspension of proceedings due to the disclosure by the Prosecution of a large volume of additional potentially exculpatory material and submitted that the volume of the Disclosed Material is three times the amount of material disclosed in November 2010, which warranted a one-month suspension of proceedings.⁴

3. The Accused submitted that if there were no suspension of proceedings the trial would continue without his team having an opportunity to review the Disclosed Material which would cause him irreparable prejudice.⁵ In support of this submission, he argued that it “is simply impossible to review, or even catalogue” the volume of Disclosed Material while the trial continues, given the resources already devoted to the preparation of ongoing witnesses.⁶ In addition, he argued that requiring his team to “deal with piecemeal disclosure of the events in the municipalities is highly prejudicial” given that it was the Prosecution’s responsibility and his entitlement, to have this material disclosed to him before the trial commenced.⁷

¹ Motion, para. 2.

² Motion, paras. 2-3.

³ Motion, para. 11

⁴ Motion, paras. 7-9.

⁵ Motion, paras. 4-5.

⁶ Motion, para. 3.

⁷ Motion, para. 6.

4. The Accused also submitted that he has been prejudiced by not having all of the Rule 68 material in the possession of the Prosecution before commencing his cross-examination of witnesses related to the municipalities component of the case and that it “prevents him from formulating a coherent defence strategy and takes away from the day to day preparation which is necessary to cross-examine witnesses on an ongoing basis”.⁸ Finally, he asserted that the requested suspension would “stop the ongoing prejudice from witnesses being called who cannot be confronted with material disclosed after they have testified” and that a failure to suspend would taint the municipalities portion of the case given the “unfairness stemming from the prosecution’s disclosure violations”.⁹ In support of this submission, the Accused also made reference to the 37 disclosure violation motions which had been filed before receipt of the Disclosed Material and the alleged disclosure violations which have continued since the end of the last suspension of proceedings in December 2010.¹⁰

5. On 8 February 2011, the Prosecution filed the “Prosecution’s Response to Karadžić’s Motion for Fourth Suspension of Proceedings” (“Response”), opposing the Motion. The Prosecution asserted that the Accused had failed to provide valid reasons to justify the exceptional measure of an adjournment, that he should be expected to “allocate resources to consider newly-provided Rule 68 material on a continuing basis throughout the trial” and that he cannot allocate all his resources to witness preparation.¹¹ In support of this submission, the Prosecution argued that the indices to the Disclosed Material provided by it would allow the Accused to prioritise and identify material relevant to upcoming witnesses.¹² Finally, the Prosecution asserted that if the Accused is unable to properly identify and assess the Disclosed Material before the cross-examination of a particular witness, he could make a “focused request for additional time to prepare for cross-examination, or, in the event the witness has already testified, a request to recall the witness for further cross-examination”.¹³

6. In the alternative, the Prosecution submitted that if the Chamber decided to grant an adjournment, the requested three-month suspension was excessive and that, given the resources available to the Accused, his team should be able to complete its review of the Disclosed Material within approximately one week.¹⁴ The Prosecution also submitted that the Chamber

⁸ Motion, para. 10.

⁹ Motion, para. 12.

¹⁰ Motion, paras. 5, 9.

¹¹ Response, paras. 1, 5.

¹² Response, para. 3.

¹³ Response, para. 7.

¹⁴ Response, paras. 8-12.

should not “take into consideration any anticipated future disclosure” in determining the appropriate adjournment period.¹⁵

7. On 10 February 2011, the Chamber orally granted the Motion in part and found that it was in the interests of justice for proceedings to be suspended for a period of six weeks, but that it was not necessary for the suspension to take effect on 15 February 2011 as requested by the Accused.¹⁶ In deciding that a suspension of six weeks was sufficient for the Accused to prioritise his review of the Disclosed Material and incorporate it if necessary into his ongoing preparations for trial, the Chamber considered the volume of the Disclosed Material, the number of members on the Accused’s defence team, and his own estimate of the time that was required to review the material. In order to determine the precise dates of the suspension, the Chamber invited the Prosecution to identify whether there were specific witnesses who were scheduled to testify on fixed dates in March or April who could not be re-scheduled.¹⁷ The Prosecution subsequently stated that KDZ182 was fixed to testify on 8 and 9 March 2011, and Anthony Banbury (KDZ444) was fixed to testify on 15, 16 and 17 March 2011.¹⁸

8. The Chamber recalls that Articles 20(1) and 21(4)(c) of the Statute of the Tribunal (“Statute”) protect the rights of an accused person to be tried expeditiously, with full respect for his rights, and without undue delay. In addition, Article 21(4)(b) of the Statute provides that an accused person should have “adequate time and facilities for the preparation of his defence”. The Chamber further recalls that an adjournment of the proceedings is an exceptional measure, which it will only order if convinced that it is in the interests of justice to do so.¹⁹

9. In the “Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision”, the Prosecution was ordered to identify and disclose Rule 68 material to the Accused as follows:

(i) Rule 68 material from ongoing and related completed cases relating to the period before the Decision, by 23 December 2010, (ii) Rule 68 materials found in searches that have been completed but the search results are still subject to review, by 31 January 2011, (iii) Rule 68 materials identified from searches that are “currently being conducted”, by 28 February 2011, and (iv) Rule 68 material identified during witness-related searches for all Prosecution witnesses, by 18 April 2011.²⁰

¹⁵ Response, para. 13.

¹⁶ Hearing T. 11474-11476 (10 February 2011).

¹⁷ Hearing T. 11474-11476 (10 February 2011).

¹⁸ Hearing T. 11734 (11 February 2011). The Prosecution originally indicated that Banbury was fixed to testify from 14 to 16 March 2011 but indicated on 12 February 2011 that he could commence his testimony on 15 March 2011.

¹⁹ Decision on Accused’s Motion for Suspension of Proceedings, 18 August 2010, para. 5.

²⁰ Decision on Prosecution’s Request for Reconsideration of Trial Chamber’s 11 November 2010 Decision, 10 December 2010 (“Reconsideration Decision”), para. 17.

These deadlines were set by the Chamber because the Prosecution claimed that it was not going to be able to meet the 17 December 2010 deadline previously set by the Chamber for the search for and disclosure of all potentially exculpatory materials in its possession.²¹ The second deadline listed above clearly prompted the mass disclosure of the Disclosed Material on 31 January 2011.

10. The Chamber considers that the Response indicates a failure by the Prosecution to give adequate weight to the importance of its obligation to disclose potentially exculpatory material as soon as practicable, and the impact of the late disclosure of large volumes of documents pursuant to Rule 68 on the Accused's resources and preparations for trial. While the Chamber has held that "it is not necessary for the trial to be suspended whenever new Rule 68 material" is disclosed, it has suspended proceedings when it considered that the large volume of material disclosed warranted a suspension to allow the Accused "sufficient time to review and incorporate that material if necessary into his ongoing preparations for trial".²²

11. The suggestion by the Prosecution that 32,000 pages of documents and 200 hours of video which are described as materials which "may fall within the ambit of Rule 68 or may be of relevance for the defence case" can be disclosed *en masse* to the Accused on a single day, with an expectation that he should be able to continuously review and incorporate this volume of material, if necessary, into the conduct of his defence is untenable. While a detailed index of the Disclosed Material was provided by the Prosecution to the Accused and will undoubtedly assist his review, the Chamber has previously held that "such an index cannot substitute for his own detailed review of all the material ... so that the Accused can be satisfied as to the nature of its content and whether it contains anything exculpatory or otherwise important for his defence".²³

12. The Chamber is not satisfied that continuing with the trial proceedings, and allowing the Accused to later recall certain witnesses for further cross-examination following his review of the Disclosed Material, if necessary, is sufficient, in this instance, to ensure his fair trial rights. Moreover, it will not be, in practical terms, conducive to the smooth conduct of the trial. In reaching this conclusion the Chamber also notes that the pattern of disclosure violations in this case has continued and is mindful of the impact which this has had on the smooth and orderly conduct of the trial. As announced on 10 February 2011, in its oral decision on the Motion, the

²¹ Reconsideration Decision, para. 15.

²² Decision on Accused's Twenty-Second, Twenty-Fourth and Twenty-Sixth Disclosure Violation Motions, 11 November 2010, para. 40; Decision on Accused's Thirtieth and Thirty-First Disclosure Violation Motions, 3 February 2011, para. 13.

²³ Decision on Accused's Motion for Suspension of Proceedings, 18 August 2010, para. 6.

Chamber, considers it appropriate to suspend the proceedings for a period of six weeks.²⁴ That six week period will commence following the hearing of evidence from Anthony Banbury, which is expected to conclude on 17 March 2011.

13. The Chamber reiterates its deep concern about the volume of potentially exculpatory material which the Prosecution continues to disclose to the Accused, and the impact which this has had on the Accused's preparations and the smooth conduct of this trial. When the deadlines were set by the Chamber for the disclosure of outstanding Rule 68 material, it was not expected that the volume of material that had not already been disclosed to the Accused would be so large. It demonstrates an underlying failure by the Prosecution to give adequate weight to the importance of its disclosure obligations under the Rules and to heed the repeated calls by the Chamber to improve its disclosure practices. The Chamber considers that the Prosecution can use the six-week suspension period to expedite its searches for outstanding Rule 68 material, including all witness-related searches. The Chamber is therefore minded to bring forward the final deadline for disclosure of all remaining Rule 68 material currently in the possession of the Prosecution from 18 April 2011 to 31 March 2011. This does not affect the 28 February 2011 deadline for disclosure of Rule 68 materials identified in searches that are "currently being conducted" by the Prosecution.

14. For the foregoing reasons, and pursuant to Articles 20(1) and 21(4)(c) of the Statute and Rule 54 of the Rules, the Trial Chamber hereby **GRANTS** the Motion **IN PART**, and:

- a) **ORDERS** that the proceedings shall be suspended from 21 March and will resume on 5 May 2011; and
- b) **ORDERS** that the Prosecution complete its outstanding searches for and disclosure of potentially exculpatory materials pursuant to Rule 68 by 31 March 2011.

Done in English and French, the English text being authoritative.



Judge O-Gon Kwon
Presiding

Dated this sixteenth day of February 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

²⁴ T. 11474-11476 (10 February 2011).